

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LONNIE WALKER, JR.,

Defendant-Appellant.

UNPUBLISHED

December 7, 1999

No. 208972

Calhoun Circuit Court

LC No. 97-002159 FH

Before: Hoekstra, P.J., and McDonald and Meter, JJ.

PER CURIAM.

Defendant was convicted by a jury of larceny in a building, MCL 750.360; MSA 28.592, and sentenced as a third habitual offender, MCL 769.11; MSA 28.1083, to serve a prison term of three to eight years. Defendant appeals as of right. We affirm.

Defendant claims that the trial court abused its discretion in denying his request to instruct the jury on the lesser misdemeanor offense of larceny under \$100, MCL 750.356; MSA 28.588. We disagree. We review a trial court's denial of a request to give an instruction for an abuse of discretion. *People v Stephens*, 416 Mich 252, 265; 330 NW2d 675 (1982); *People v Malach*, 202 Mich App 266, 276; 507 NW2d 834 (1993). An abuse of discretion exists if a reasonable person would find no justification or excuse for the ruling. *Malach, supra*.

In *Stephens, supra* at 255, 261-265, our Supreme Court adopted a five-part test to be used in determining the appropriateness of instructions on lesser included misdemeanor offenses. Here, the trial court properly recognized the authority of *Stephens* and applied its five-part test in making its decision, but found that two of the requirements were not met in this case. The court held that the request was not supported by a rational view of the evidence and that the requested instruction would result in undue confusion.

Upon review, we find no abuse of discretion in the trial court's ruling. Indeed, defendant does not argue that the trial court abused its discretion but, rather, he merely asserts that another result could have been reached. The assertion that another result is possible does not amount to an abuse of discretion. To the contrary, we find the decision of the trial court to be eminently reasonable when

considered in the context of the facts of this case. The evidence introduced at trial did not raise a question regarding whether the incident took place inside or outside a building. Thus, in order to reach a finding of guilty on the lesser offense of larceny under \$100, the jury would, of necessity, have had to find that the theft occurred within a building and, consequently, defendant would be guilty of the principal charge. This fact makes defendant's request both inconsistent with a rational view of the evidence and susceptible to causing undue confusion.

Next, defendant argues that his sentence is invalid because he did not enter a plea on the habitual offender notice and because the trial court neither made specific findings regarding the existence of any prior convictions nor held a hearing to determine such status. We note, however, that defendant did not challenge his status as an habitual offender in the lower court, and therefore he has waived review of this issue absent manifest injustice. See *People v Sabin*, 223 Mich App 530, 531-532; 566 NW2d 677 (1997). Because there was sufficient evidence from which the trial court could conclude that defendant was in fact an habitual offender, we perceive no such injustice. Further, we reject defendant's argument that he was entitled to enter a plea and to have a hearing regarding his habitual offender status because the current state of the law regarding habitual offender sentencing does not require employing the procedure upon which defendant relies. MCL 769.13; MSA 28.1085.

Finally, defendant argues that the trial court's sentence of three to eight years' imprisonment is disproportionate because neither the severity of the offense nor defendant's prior record justify the length of the prison term. We disagree. When reviewing an habitual offender's sentence, this Court is limited to considering whether the imposed sentence violates the principle of proportionality, without reference to the sentencing guidelines. *People v Crawford*, 232 Mich App 608, 621; 591 NW2d 669 (1998). An abuse of discretion will be found where the sentence imposed does not reasonably reflect the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990); *People v Castillo*, 230 Mich App 442, 447; 584 NW2d 606 (1998).

Here, the trial court based its sentence on defendant's extensive criminal record and the fact that defendant had been given numerous chances to prove that he could abide by the rules of society, yet continually failed to do so. Over the five years preceding the instant offense, defendant had been convicted of four theft crimes and two probation violations. At the time of his arrest for the instant offense, defendant was on probation for a 1996 conviction of receiving and concealing stolen property valued at more than \$100. During sentencing on that conviction, the trial court informed defendant of its reluctance to impose only a probationary sentence and warned defendant that any further misconduct on his part would most certainly result in his serving a prison sentence. Defendant's record clearly demonstrates that prior attempts to rehabilitate him have utterly failed, and that community supervision is not effective for him. In light of these prior convictions and probationary failures, we conclude that defendant's sentence is

proportionate to the seriousness of the circumstances surrounding the offense and the offender,¹ and therefore the trial court did not abuse its discretion in sentencing defendant.

Affirmed.

/s/ Joel P. Hoekstra

/s/ Gary R. McDonald

/s/ Patrick M. Meter

¹ Within his argument, defendant suggests that the sentence imposed is disproportionate in light of the sentencing guidelines recommendation of 6 to 24 months' imprisonment. Contrary to defendant's assertion, such a comparison is not insightful because sentencing guidelines are not to be considered when determining habitual offender sentences:

[O]ur Supreme Court has made clear that the sentencing guidelines no longer have a place in determining the proportionality of an habitual offender's sentence. While the proportionality of an habitual offender's sentence is still reviewed under the abuse of discretion standard, the guidelines have no bearing with regard to whether an abuse has occurred. [*People v Yeoman*, 218 Mich App 406, 419; 554 NW2d 577 (1996).]